No. 82-1132

In the Supreme Court of the United States

October Term, 1982

JOSE SALDANA, *Petitioner,*

vs.

ANTONIO GARZA AND RICARDO OLVERA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner states the Questions for Review.

LIST OF PARTIES

Jose Saldana
Antonio Garza
Ricardo Olvera

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OPINIONS BELOW

The Opinions Below are included in the Appendix to Petitioner's Petition for Certiorari. In addition, the Opinion of the Fifth Circuit Court of Appeals is also published as *Saldana v. Garza*, 684 F.2d 1159 (5th Cir. 1982).

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. § 1254(1). The fourth issue presented by Petitioner, however, was not raised or addressed by the Court below. This Court has no jurisdiction to consider that issue.

STATUTES INVOLVED

The Petitioner sets forth the statutes involved with the exception of:

Texas Penal Code:

Sec. 42.01 Disorderly Conduct

(a) A person commits an offense if he intentionally or knowingly:

(5) Makes unreasonable noise in a public place or in or near a private residence that he has no right to occupy.

STATEMENT OF THE CASE

On or about Sunday, February 15, 1976, during the late evening hours, in response to a call complaining of loud music, McAllen Police Officers Reymundo Sanchez and J. J. Lopez were dispatched to a residence in McAllen, Texas. The officers found Petitioner, Jose Saldana, and other men playing loud music and drinking. Petitioner and the others were told by the police officers to turn down the volume of the music and to stay off the street and on their property. The volume of the music was lowered, and the police officers departed. (Tr. pp. 303-306, 312).[1]

Thereafter, while on routine patrol, Respondent Officers Garza and Olvera heard loud music and yelling. The disturbance was audible at a distance of one and one-half blocks from the location of the officers, and the time of day was 11:00 o'clock p.m. The officers decided to investigate. (Tr. pp. 135, 215, 270). Respondents did

1. Tr. refers to the transcript of the trial proceedings.

not intend to arrest the individuals causing the disturbance. They merely intended to request that the music be turned down. (Tr. p. 135).

At the time Respondents arrived at the scene of Petitioner's home, Petitioner admitted to having consumed four to five beers at the scene. He also admitted drinking beer earlier in the day. (Tr. pp. 92, 97, 98). The Petitioner was upset and angry. (Tr. p. 47). When confronted by Respondents regarding the loud music, Petitioner became argumentative and belligerent. Respondents found Petitioner to be intoxicated, off balance, unsteady on his feet, and in a public place; to-wit: the street and right of way in front of his home. (Tr. pp. 163, 217, 220, 221, 259, 273, 279, 280).[2]

Respondents determined that Petitioner was, because of his intoxicated and boisterous state, a danger not only to himself, but to others. They feared that he could have been hit by cars driving on the street, that he could have caused or been involved in altercations with the neighbors, or that he could have gotten into his car and driven off in a reckless manner. (Tr. pp. 220, 280, 281). Simultaneously, Respondents heard Petitioner use vulgar and abusive language, while in a public place. The vulgar and abusive language was directed at the officers. (Tr. pp. 272, 274, 294).

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2. The jury found that Petitioner was in a public place even though Petitioner continues to claim, even at this level, that he was on private property. The jury's finding of a lawful arrest can only mean that the Petitioner was on public property, especially when one considers the trial judge's instruction: "You will notice that underlying this matter we make reference to 'public place' several times. There is evidence that it was out in the street. There is evidence that it was not out in the street. That is something that you are going to have to determine, not us, because it is your province." (p. 15, Reporter's Supplemental Transcript of Proceedings).

Petitioner was arrested by Respondent Garza and charged with public intoxication and disorderly conduct by abusive language. During the course of the arrest, there was a minor struggle between Petitioner and Respondent Garza. (Tr. p. 221).

At the close of evidence in the trial court, both sides requested a directed verdict. The District Court found that there was insufficient evidence to submit any issues to the jury regarding the conduct of Respondent Olvera. The conduct of Respondent Garza was submitted to the jury, and the jury returned its verdict finding that the arrest was lawful and further finding that there was no excessive force used in making the arrest. The trial court entered a judgment that Petitioner take nothing, and he appealed.

The Fifth Circuit Court of Appeals affirmed the judgment of the trial court, concluding that Respondents were entitled to good faith immunity for their actions.

ARGUMENT

Reasons Why The Writ Should Be Denied

I.

The Panel Has Not Created A New Defense In Conflict With Pierson v. Ray.

No Writ of *Certiorari* is necessary because the Fifth Circuit Panel has not created any new defenses; nor has it done violence to the doctrine set out in *Pierson v. Ray*, 386 U.S. 547 (1967). It is not disputed that *Pierson v. Ray* speaks in terms of "good faith and probable cause". However, the Court could not have meant probable cause in the constitutional sense. This has been recognized since the Second Circuit's Opinion in *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339 (2d Cir. 1972).

To make an individual police officer liable in damages for an arrest made in good faith; but without probable cause, as later found by a court, would be tantamount to making the police officer a guarantor of the rights of those arrested. This is especially true when one considers that the municipality that hires the officer has no liability under respondeat superior. The trial judge who, after the fact, determines the nonexistence of probable cause is absolutely immune from liability.[3]

An individual officer confronted with a situation at 11:00 o'clock p.m. on the streets of McAllen, Texas, does not have the burden to determine probable cause in its constitutional sense. *Pierson* and its progeny do not stand for the proposition that an officer must make a constitutional determination, equal in scope to that made by a

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3. See Nahmod, *Civil Rights and Civil Liberties Litigation*, pp. 248-258 (1979).

learned trial judge only after presentation of evidence and review of statutes. To follow Petitioner's interpretation would hamstring law enforcement.

The defense of "good faith and probable cause" and "good faith or probable cause" is of no moment regarding the results of the litigation between the parties involved. There was no evidence regarding bad faith or personal malice. The jury was duly instructed regarding probable cause. (Reporter's Supplemental Transcript of Proceedings pp. 13, 14). Implicit in the jury's finding was a finding that officers acted with probable cause. See *Saldana v. Garza*, 684 F.2d 1159, Footnote 20. Therefore, the granting of *certiorari* in this case could not have any bearing on the rights of Petitioner since Respondents have met all possible burdens.

II.

The Panel Below Was Correct In Its Determination Of Burden Of Persuasion.

This Court in *Harlow v. Fitzgerald*, ... U.S. ....., 102 S.Ct. 2727, carefully weighed the factors previously involved in the assertion of qualified immunity. The Court weighed the subjective elements of the good faith defense on the one hand against the admonition in *Butz v. Economou*, 488 U.S. 478 (1978), on the other. The *Butz* admonition was that insubstantial claims should not proceed to trial. In *Harlow*, the Court said:

> "In the context of *Butz's* attempted balancing of competing values, it is now clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of

able people from public service. *Harlow v. Fitzgerald*, 102 S.Ct. 2727, at 2738."

This Court decided in balancing that the costs, distractions and inhibitions of the subjective good faith defense should be avoided and that henceforth ". . . government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. (Citations omitted).

The Panel of the Fifth Circuit has not done away with the burden placed upon defendants wishing to claim the qualified immunity defense. The Court clearly stated: "Thus, it is the Defendant who bears the burden of pleading his good faith and establishing that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." (Footnote and Citations omitted, *Saldana v. Garza*, p. 1163).

Only after a defendant has met the burden required of it by *Harlow* and the Fifth Circuit in *Saldana v. Garza* does the duty to go forward shift to the plaintiff to prove objectively that the wrongful conduct violated clearly established law. *Harlow*, after balancing, decided to save the government official the costs, distractions and inhibitions surrounding litigation of insubstantial claims. It is illogical to now impose upon government officials that burden which *Harlow* sought to relieve.

The burden to establish whether a law was, or was not, clearly established at the time of an alleged wrong is not overpowering. If a plaintiff objectively proves that a defendant's conduct violates a law that was clearly established, he has solved his immunity defense problems unless the government official can claim extraordinary circumstances. *Harlow* clearly places the burden upon the

government official if, in the face of violating a clearly established law he chooses to prove that because of extraordinary circumstances, he neither knew nor should have known of the clearly established law. *Harlow v. Fitzgerald*, 2739.

III.

The Panel Below Correctly Allocated The Persuasion Burden And Properly Applied Qualified Immunity To The Police Officers.

Nowhere in the litigation generated by the events of February 15, 1976, has it been suggested that the police officers involved were not acting in their official capacities as law enforcement officers. It is equally clear that the Petitioner was arrested pursuant to Sections 42.01 (a)(1), 42.01(a)(5) and 42.08 of the Texas Penal Code. (Tr. pp. 172, 274, 294). A police officer is authorized to make a warrantless arrest for violation of Section 42.01 of the Texas Penal Code. *Brown v. State*, 594 S.W.2d 86, 87 (Tex. Cr. App. 1980). It is immaterial whether the Petitioner was charged with or tried for all of the violations he committed. *Michigan v. DeFillippo*, 443 U.S. 31 (1979). Likewise, it is immaterial whether the Petitioner was acquitted of the charges he was arrested for. The constitution makes no guarantee that only the guilty will be arrested. *Baker v. McCollan*, 433 U.S. 137 (1979).

Petitioners, therefore, conclusively showed that they were governmental officials, performing discretionary functions and that their conduct did not violate clearly established statutory or constitutional rights. Petitioners clearly met the burden in *Harlow v. Fitzgerald*. Not only did they meet the burden in *Harlow v. Fitzgerald*, they met the burden in all qualified immunity cases decided prior to *Harlow* since the jury found in favor of the Defendants.

The jury's finding established the subjective good faith that *Harlow* obviated.

Petitioners claim that the qualified immunity discussed in *Harlow v. Fitzgerald* is somehow different from the qualified immunity pertaining to a "good faith" defense and, therefore, is not available to "lower-ranking" people such as police officers. Such an allegation is clearly not the status of the law. A police officer's inclusion among those entitled to qualified immunity was specifically pointed out in *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974). Additionally, there are numerous cases and precedents allowing the defense of qualified immunity to various "low-ranking" officials within governmental framework. Police officers have consistently been entitled to such a defense: *Procunier v. Navarette*, 434 U.S. 555 (1978); *Logan v. Shealy*, 600 F.2d 1007 (4th Cir. 1981); *Barker v. Norman*, 651 F.2d 1107 (5th Cir. 1981); *Smith v. Gonzales*, 670 F.2d 522 (5th Cir. 1982); *Haislah v. Walton*, 676 F.2d 208 (6th Cir. 1982); *Wolfel v. Sanborn*, 666 F.2d 1005 (6th Cir. 1982); *Landrum v. Moats*, 576 F.2d 1320 (8th Cir. 1978); *Harris v. City of Roseburg*, 664 F.2d 1121 (9th Cir. 1981); and *Martin v. Duffie*, 463 F.2d 464 (10th Cir. 1972). Additionally, jailers and correction officers have been held entitled to qualified immunity: *Devasto v. Faherty*, 658 F.2d 859 (1st Cir. 1981); *Bryan v. Jones*, 530 F.2d 1210 (5th Cir. 1976); and *Reeves v. City of Jackson, Mississippi*, 608 F.2d 644 (5th Cir. 1979). Sheriffs and their deputies have been afforded qualified immunity in *Harris v. Pirch*, 667 F.2d 681 (8th Cir. 1982) and *State of Missouri v. Fidelity & Deposit Company*, 179 F.2d 327 (8th Cir. 1950). High-ranking school officials, *Wood v. Strickland*, 420 U.S. 76 (1975), *United Carolina Bank v. Board of Regents*, 665 F.2d 553 (5th Cir. 1982); high-ranking prison officials, *Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978), *Cruz v. Beto*, 603 F.2d 1178 (5th Cir. 1979), and police superintendents,

Gomez v. Toledo, 446 U.S. 633 (1980) have all been afforded the immunity. Therefore, Petitioner's allegations are without merit and certiorari need not be granted on these points.

IV.

This Court Is Without Jurisdiction To Consider Petitioner's Claim For The Extension Of Municipal Liability.

It is Petitioner's burden to establish that the substance of his claim has in the first instance been presented to the Court below. *Picard v. Connor*, 404 U.S. 270, 275-278 (1971). The cases are so numerous that it is clear that this Court cannot decide issues raised for the first time on Petition for Writ of Certiorari or on appeal and that the Court will not decide federal questions not raised and decided in the Court below. *Tracon v. Arizona*, 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

Nowhere in the trial below, nor the appeal to the Fifth Circuit Panel, has Petitioner ever raised this issue. In view of his failure to raise this issue, the application for certiorari should be denied for want of jurisdiction. *Cardinale v. Louisiana*, supra, 439.

This Court in its landmark decision of *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978) held that ". . . Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tort-feasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." Id., 691. Every case following *Monell* has adhered to the Court's reasoning, and Petitioner has showed no reason for holding otherwise.

CONCLUSION

For the above reasons, Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, B. Buck Pettitt, a member of the Bar of the Supreme Court of the United States and counsel of record for Antonio Garza and Ricardo Olvera, hereby certify that on February 1, 1983, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Reply of Respondents to Petition for Writ of Certiorari on Mr. James C. Harrington, American Civil Liberties Union Foundation—South Texas Project, 303 West Park Avenue, Pharr, Texas 78577.

All parties required to be served have been served.

DATED the 1st day of February, 1983.

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